ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL FILE

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 92-51
Regulations and Policies	)	
Affecting Investment	)	
in the Broadcast Industry	)	

To: The Commission

REPLY COMMENTS OF
MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America ("MPAA"), by its attorneys, hereby replies to certain comments filed in response to the Notice of Proposed Rulemaking in the above-referenced proceeding with respect to the prohibition against third-party security interests in FCC broadcast licenses.

In keeping with the spirit of the Commission's request in the NPRM that commenters not repeat arguments already made, MPAA's reply comments are limited to responding to certain comments citing two specific court cases as supporting elimination of the prohibition on the grant of security interests in broadcast licenses. With regard to the commenters' substantive arguments, however, MPAA directs the Commission's attention to its Comments filed on June 12, 1992, in this proceeding and also to its Comments filed on June 21, 1991, on Hogan & Hartson's Petition for Declaratory Ruling.

1. **Reliance On The Bankruptcy Court's Decision In Ridgely Is Wrong As A Matter Of Law And Policy.**

Greyhound Financial Corporation suggests that the bankruptcy court's decision in In re Ridgely Communications, Inc., Case No. 89-5-1705-JS, Bankr. L. Rep. (CCH) ¶ 74,614, 1992 Bankr. LEXIS 567 (Bankr. D. Md. April 15, 1992) ("Ridgely"), "provides a reasoned approach which strikes a fair balance as between the Commission's legitimate regulatory concerns and the reasonable expectations of private parties to financing arrangements." Comments of Greyhound Financial Corporation at 18 (filed June 12, 1992). In essence, the Ridgely court held that a security interest may be granted and perfected in a broadcast license, but only to the extent of the proceeds from the sale of such license. Id. at 15-18. Greyhound urges the Commission to adopt the reasoning of the court in Ridgely and to recognize "the right of a senior secured lender to claim the proceeds received by the debtor licensee from a private buyer in exchange for the sale of the station as a going concern." Id. at 18. See also Comments of Sheppard, Mullin, Richter & Hampton at 8-11 (filed June 12, 1992).

The Ridgely decision is of questionable precedential value, however, and reliance on it is simply wrong as a matter of law and policy. The written opinion itself, which contained the language referred to by Greyhound, followed the actual Order by almost five months. The Order, which was entered on

November 20, 1991, essentially provided that the senior lender, Ameritrust Company National Association ("Ameritrust") was entitled to all of the net proceeds of the sale of radio stations owned by the bankrupt debtor. See Order Denying Motion to Value Collateral Pursuant to Bankruptcy Code § 506(A) and to Use Liquidation Value, In re Ridgely Communications, Inc., Case No. 89-5-1705-JS (Bankr. D. Md. entered November 20, 1991) (the "Order"). From the briefs, however, it appears that the issue of whether the secured lender, Ameritrust, held a valid security interest in the debtor's FCC licenses was a red herring.

The stations at issue had already been sold pursuant to the bankruptcy court's order. Ameritrust thereafter had filed a Motion to Distribute Proceeds and Dismiss Case. It appears from Ameritrust's brief that the only parties to oppose Ameritrust's motion were the debtor and the debtor's owner, Anne K. Kramer. In the context of their opposition, the debtor and Mrs. Kramer raised the question of whether Ameritrust held a valid security interest in the debtor's FCC licenses. But, according to Ameritrust, Mrs. Kramer had previously entered into a Subordination Agreement in favor of Ameritrust, pursuant to which she agreed that any sums owing from the debtor to her would be paid over to Ameritrust, and that until the debtor's obligations to Ameritrust had been paid in full, only Ameritrust was entitled to receive any distributions from the debtor. According to Ameritrust, Mrs. Kramer therefore lacked

standing to raise any objections to Ameritrust's motion. See Ameritrust's Memorandum in Response to Motion to Value Collateral Pursuant to Bankruptcy Code § 506(a) at 5-6, In re Ridgely Communications, Inc., Case No. 89-5-1705-JS (Bankr. D. Md.). Accordingly, the issue of the validity of the security interest in the debtor's FCC licenses was not squarely presented in Ridgely.

The transcript of the hearing that led to the Order creates even more ambiguity. Before the hearing commenced, counsel for Ameritrust pointed out that "it is not necessary to argue that legal issue [whether or not Ameritrust has a lien on the FCC license] today. We are prepared to have the Court defer that legal issue and go directly to the issue of valuation which we believe, if the Court hears the evidence on valuation, the Court will find that it won't be necessary to address the legal issue, and therefore can dispose of the case on the valuation issue." Transcript of Hearing on Motion to Value Collateral Pursuant to Bankruptcy Code and to Use Liquidation Valuation at 5-6, 11 (lines 1-6), 14 (lines 23-25), In re Ridgely Communications, Inc., Case No. 89-5-1705-JS (Bankr. D. Md. November 6, 1991). Ameritrust's Motion to Distribute Proceeds and Dismiss the Case was not on the docket that day, and therefore the parties only argued the debtor's Motion to Value Collateral Pursuant to Bankruptcy Code § 506(a) and to Use Liquidation Value. Id. at 3 (lines 6-8), 6 (lines 5-12).

After hearing the debtor's evidence on the valuation question, the bankruptcy judge cut off examination of the bank's first witness and issued a ruling from the bench. Id. at 56 et seq. While the bankruptcy judge indicated that he believed the bank held a security interest in the debtor's FCC licenses (id.), the judge's ruling was that the transaction had been an arm's length sale of going concerns and not a liquidation sale. Id. at 57. The judge specifically stated that he was not ruling on the Motion to Distribute Proceeds and Dismiss the Case, which raised the FCC license security interest issue, because he wanted to give the debtor an opportunity to oppose it. Id. at 62-63. It appears that the case was subsequently settled and the judge never ruled on this motion.

The opinion in Ridgely therefore appears to be a post hoc rationalization of a statement in the Order (which apparently was prepared and submitted by Ameritrust) to the effect that Ameritrust held a security interest in the debtor's broadcast licenses. It was, however, unnecessary to the result of the decision because Ameritrust was entitled to receive all of the net proceeds of the sale in any event, pursuant to the Subordination Agreement with Mrs. Kramer. Therefore, the discussion in the Ridgely decision regarding security interests in FCC licenses was unnecessary and thus dicta.

In addition, the Ridgely bankruptcy judge's critique of U.S. District Court Judge Crabb's decision in New Bank of

New England, N.A. v. Tak Communications, Inc., (In re Tak Communications, Inc.), 1992 U.S. Dist. LEXIS 3687, 70 R.R.2d 810 (W.D. Wis. 1992), is also unfounded. The Ridgely judge criticized the Tak decision on two grounds. First, he noted that Tak did not involve an attempt by "debtor's insiders claiming against fully secured creditors." Second, he said that Judge Crabb incorrectly held that FCC licenses are not property of a bankrupt's estate. His first observation--that the Ridgely case involved claims by insiders--illustrates why his ultimate holding regarding security interests was unnecessary in that case. His second criticism is simply wrong. See Ridgely at Conclusions of Law ¶ 13. Nowhere did Judge Crabb indicate that broadcast licenses are not an asset of a debtor's bankruptcy estate. In fact, this point is well-established. See, e.g., LaRose v. F.C.C., 494 F.2d 1145, 1148 (D.C. Cir. 1974); In re Fugazy Express, Inc., 114 B.R. 865 (Bankr. S.D.N.Y. 1990), aff'd, 124 B.R. 426 (S.D.N.Y. 1991).

Furthermore, as a policy matter, the "limited" security interest proposed in Ridgely and suggested as a compromise by Greyhound and Sheppard, Mullin, Richter & Hampton would entirely undercut a significant policy rationale for the prohibition on such security interests, and is therefore scarcely "limited." The Ridgely solution would deprive unsecured creditors of the right to share in the value attributed to the FCC licenses in worst case scenarios. It would therefore eliminate the primary incentive for unsecured

creditors, particularly program suppliers, to continue to deal with stations in financial distress. Moreover, it would affect program suppliers' decision-making process as to whether to extend unsecured credit to stations initially, thereby impairing the ability of stations to obtain high-quality programming. See MPAA June 12, 1992 Comments. Ridgely does not, therefore, represent a "compromise;" it represents a wholesale abandonment of an important policy justification for the prohibition against security interests in FCC licenses.

2. The Jefferson-Pilot Decision Also Does Not Support The Grant Of Security Interests.

The U.S. Tax Court's decision in Jefferson-Pilot Corp. v. Comm'r of Internal Revenue, 1992 U.S. Tax Ct. LEXIS 36, 70 R.R.2d 999 (T.C. 1992), cited by Commenters Media Venture Partners at 6, also does not support the argument that the Commission should permit the grant of a security interest in a broadcast license. In that case, the Tax Court held that an FCC license was a "franchise" within the meaning of Section 1253 of the Internal Revenue Code (as in effect in 1974) and that the taxpayer was entitled to amortize under Section 1253 the portion of the purchase price attributed to the acquisition of such "franchise rights."

The Tax Court stated that its ruling was unaffected by whether or not the taxpayer licensee held a "property interest" in the FCC licenses, because in either event an FCC license satisfied the specific statutory definition of "franchise"

found in Section 1253(b)(1) of the Code. 70 R.R.2d at 1003. (The Tax Court's decision did not change existing law that FCC licenses are not depreciable assets generally under Section 167 of the Code. Id. at 1006.)

For purposes of Section 1253 of the Internal Revenue Code, therefore, the Tax Court held that an FCC license is like a "Dairy Queen" franchise. See Comments of Media Venture Partners at 6. As MPAA has previously pointed out, many franchisors in the private marketplace prohibit (like the FCC) the grant of security interests in their franchises. Comments of MPAA on Hogan & Hartson's Petition for Declaratory Ruling at 23 n.20 (June 21, 1991). The Jefferson-Pilot decision simply has no relevance to the question of whether such a prohibition is in the public interest.

3. Conclusion

In conclusion, the record in this proceeding does not provide compelling evidence of the need for the elimination of the Commission's prohibition of the grant of security interests in broadcast licenses. In particular, there is no evidence that it would be in the public interest to increase the extent to which the acquisitions of broadcast stations are "leveraged," to the detriment of the capability of broadcast stations to obtain goods and services on an unsecured basis after the acquisition. Unsecured creditors provide broadcast stations with the programming, personnel, and equipment used to

CERTIFICATE OF SERVICE

I, Marion E. McDougal, do hereby certify that a true and complete copy of the foregoing "REPLY" was hand delivered this 13th day of July, 1992, to the following:

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